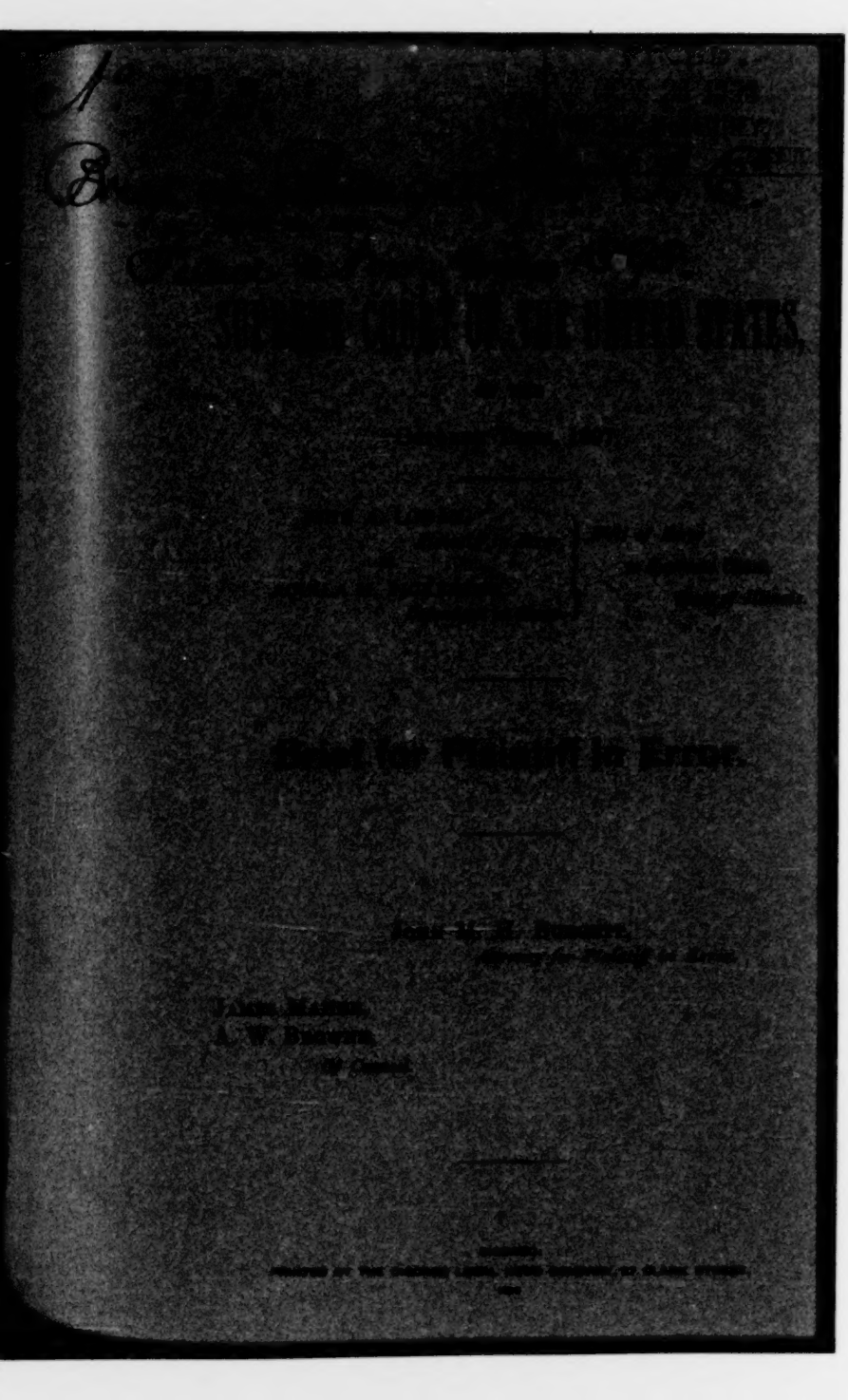

No. 16,609.

IN THE

SUPREME COURT OF THE UNITED STATES

OF THE

OCTOBER TERM, 1897.

JOHN A. LOMAX,
Plaintiff in Error,
vs.
AQUILA H. PICKERING,
Defendant in Error.

Writ of Error to Supreme Court, State of Illinois.

Brief for Plaintiff in Error.

STATEMENT OF THE CASE.

MAY IT PLEASE THE COURT:

This is a writ of error to the Supreme Court of the State of Illinois, whereby John A. Lomax, the plaintiff in error, seeks to reverse a judgment of that court in an action of ejectment. The lands in controversy consist of two certain parcels in Cook county, Illinois, and there is no dispute about the *quantum* of land or its metes and bounds. The questions before this court are purely those of law as to the validity of the conveyances, records and chain of title through which the parties to this cause respectively claim title, and the element of possession for many years established by plaintiff in error.

The lands involved in the title were originally conveyed by the United States through an Indian treaty, and by a subsequent patent to certain Indians under certain conditions and restrictions, and the questions here involved relate to a construction of those grants and the validity of certain deeds thereunder, together with the question as to the requirements of the conveyance and recording laws of the State of Illinois, and of the United States.

As this case has already been before the United States Supreme Court, which reversed the former finding of the State Supreme Court, for reasons appearing hereafter—

Pickering v. *Lomax*, 145 U. S. page 310—

we deem it more conducive to a full understanding of its present position, to give a short synopsis of the past litigation. In such *resume* of the case we omit all reference as to what was said or held as to tax titles, because, on this present appeal, neither party relies upon a tax title. In the present appeal, however, this plaintiff in error has assigned errors relating to defects in the record title of defendant in error which were not in the previous litigation before any court.

The action was originally commenced on May 5, 1883, and was tried without a jury before the Superior Court of Cook County, Illinois, and at the close of the plaintiff's (Pickering) case, without calling upon the defendant (Lomax) to offer any evidence, the court held that the plaintiff had failed to establish such a title as was necessary to a recovery, and entered a judgment in favor of the defendant. And thereupon Pickering sued out a writ of error to the Supreme Court of Illinois, which court, after a full hearing, affirmed the judgment of the

lower court, whereupon the said plaintiff sued out a writ of error in the United States Supreme Court, which court reversed the judgment of the State Supreme Court, and whereupon the cause was remanded back to the Superior Court of Cook County on the 5th day of October, 1892, and thereafter, a jury being waived, another trial was had which resulted in a judgment in favor of defendant in error, and which judgment was affirmed by the State Supreme Court on the 6th October, 1896, and a petition for rehearing denied on March 2, 1897, and the case was brought up to this court by writ of error June 1, 1897.

One of the questions then before those courts and still before this court, at bar, which is necessarily involved in Pickering's chain of title, relates to the construction of a treaty made by the United States of America and the United Nations of Chippewa, Ottawa and Pottawatomie Indians, made and concluded at Prairie du Chien July 29, 1829, as Pickering derived his title from a descendant of one of the Indians, to wit, one Joseph Robinson. The construction of the patent issued by the United States government under the provisions of the above treaty is also involved. The patent was dated December 28, 1843, and conveyed the lands subject to certain conditions to an Indian named Alexander Robinson, for himself and children, the Joseph Robinson through whom Pickering claims title being a son of the said Alexander Robinson. The treaty and provisions are set out in the transcript of record, page 12, and the patent appears on page 13 of transcript.

As it is necessary for this court to be fully informed of the merits of the case it has heretofore passed upon, and

in order to avoid recapitulation and prolix explanations, we deem it best at the outset to quote from the former opinions of the Illinois Supreme Court and of this court.

Pickering v. *Lomax*, 120 Ill. Supreme Court, 291.

"This was an action of ejectment brought by Aquila H. Pickering against John Lomax and William Kolze, to recover two certain parcels of land in Cook county, which are particularly described in the declaration. The parties waived a jury, and submitted to a trial before the court, which resulted in a judgment in favor of the defendants, and the plaintiff sued out this writ of error.

"On the trial, for the purpose of establishing title, plaintiff offered in evidence Article 4 of the Treaty between the United States and the Ottawa, Chippewa and Pottawatomie Indians, contained in the United States Statutes at Large, Volume 7, page 321:

"There shall be granted by the United States to each of the following persons (being descendants from Indians) the following tracts of land, viz., to Claude Laframboise, one section of land on the Riviere aux Pleins, adjoining the line of the purchase of 1816; to Francois Bourbonne, Jr., one section at the missionary establishment on the Fox River of the Illinois; to Alexander Robinson, for himself and children, two sections on the Riviere aux Pleins, above and adjoining the tract herein granted to Claude Laframboise. The tracts of land herein stipulated to be granted shall never be leased or conveyed by the grantees or their heirs to any person whatever without the permission of the president of the United States."

"The plaintiff also put in evidence a copy of a patent issued by the United States, December 28, 1843, under

the provisions of the treaty granting the lands to Alexander Robinson, for himself and children, which contains this provision: 'But never to be leased or conveyed by him, them, his or their heirs, to any person whatever, without the permission of the President of the United States.' Plaintiff also introduced in evidence proceedings in partition, instituted February 22, 1847, in the Cook County Court of Common Pleas, between Alexander Robinson and his children, of the lands granted by the patent wherein the lands in question were set off to Joseph Robinson. The plaintiff also introduced evidence tending to establish the following conveyances: Deed dated August 3, 1858, from Joseph Robinson and wife to John F. Horton; administrator's deed of Severn Stevens, administrator of John F. Horton, deceased, to Moses W. Baer, dated October 6, 1863—this deed having been made in pursuance of an order of sale, by the County Court of Cook County, for payment of debts. Then followed several intermediate conveyances of the premises, down to a deed dated November 10, 1866, from Henry H. Dyer and wife to Aquila H. Pickering, the plaintiff. The deed from Robinson and wife to Horton, executed August 3, 1858, has indorsed upon it the approval of the president of the United States, of date *January 21*, 1871.

"The treaty under which the lands were granted to Alexander Robinson and his children was concluded on the 29th day of July, 1829. Whether the deed executed August 3, 1858, from Joseph Robinson and wife to John F. Horton, without the permission of the President of the United States, was sufficient to pass the title to the lands attempted to be conveyed involves a construction of the

last clause of the treaty set out above, and also that clause of the patent prohibiting a conveyance without permission of the President. The object of the condition, in restraint of sale, is manifest. It was designed for the benefit and protection of the Indian, as a safeguard to protect property bestowed upon him against fraud, imposition, and his own improvidence in the disposition of his lands. The wisdom of such a provision, in view of the condition of the Indian at the time, and his liability to be defrauded out of his property unless the protecting hand of the government was interposed in his behalf, is not nor can not be questioned.

" It is true that the patent issued to Robinson granted the fee in the lands and we are not unmindful of the fact that a limitation upon the fee as a general rule, is contrary to the policy of our law. But we think it is well settled, in a case of this character, that effect will be given to conditions imposed in a treaty, and a patent issued by the government in pursuance of a treaty made with the Indian tribes. The patent under which Robinson and his children derived their title to the land prohibits a lease or conveyance of the land by all or either of them without the permission of the president of the United States. The grant was made in pursuance of a treaty between the government and the Indian tribes upon this condition. This mode of conveyance having been provided, by necessary implication any other is prohibited, and being prohibited, it would seem to follow that the deed was invalid and passed no title.

" A case in many respects similar to this is *Smith* v. *Stevens*, 10 Wall. 321. There a treaty was concluded by

the United States in June, 1825, with the Kansas Indidians. The sixth article provided that there should be reserved to each of the half-breeds (Victoria Smith being one of them) certain lands. The eleventh article provided that the Indians shall never sell or dispose of the lands reserved without the permission of the United States for that purpose first had and obtained. On May 26, 1860, Congress passed an act referring to the treaty of 1825, and reciting that the land reserved had been surveyed, and allotted to each of certain half-breeds, in accordance with the sixth article of the treaty; that all the title, interest and estate of the United States is hereby vested in said reservees.

The second section of the act provided that the Secretary of the Interior, upon the request of the reservees, is authorized to sell such lands for the benefit of such reservees, in accordance with the rules and regulations to be prescribed by the Commissioner of Indian Affairs, and approved by the Secretary of the Interior. On the 14th day of August, 1860, Victoria Smith, one of the half-breeds, being in possession of her tract, executed a deed purporting to convey it to one Stevens, and he went into possession of the land. Subsequently, Victoria Smith brought ejectment against Stevens, to recover the land. As a defense, he relied upon the deed of August 14, 1860, but the State courts of Kansas held the deed was void, and this ruling was affirmed in the Supreme Court of the United States.

In the case cited, the treaty provided that the lands reserved should not be conveyed without the consent of the United States, and the act of Congress, subsequently

passed, vested the title in the Indians or half breeds, and provided for a sale by the Secretary of the Interior, on request of the Indians. This mode of sale was disregarded and an absolute deed made without the consent of the Secretary of the Interior, while in the case under consideration the treaty and patent require the consent of the President to a sale. It seems plain that the rule which should control one case should be binding in the other. In disposing of the case in the Supreme Court, it is said: "It was considered by Congress to be necessary, in case the reservees should be desirous of relinquishing the occupation of their lands, that some method of disposing of them should be adopted which would be a safeguard against their own improvidence; and the power of Congress to impose a restriction on the right of alienation, in order to accomplish this object, can not be questioned."

"It is also said: 'The sale in question not only contravened the policy and spirit of the statute, but violated its positive provisions.' The conclusion of the court is, that under the treaty and law in force at the date of the deed, Victoria Smith had no power to sell, and as the Secretary of the Interior never authorized the sale or consented to it, the sale was void, and the deed passed no title. Here the deed was made, as was said before, without the permission of the President, and in violation of the treaty and the provisions of the patent, and if no title passed in the case cited, as was held, for the same reason we must hold no title passed in this case. It is true that thirteen years after the deed in question was made, and after the death of the grantee, it was approved by the President; but we

do not regard this as a compliance with the conditions upon which a sale might be made. The sale was consummated, if at all, upon the execution and delivery of a deed. The validity of this act required the consent of the President. It was not obtained, and the act was nugatory, and could not be validated by any subsequent attempted approval."

Thereupon the court, after adverting to some tax deeds, affirmed the judgment of the lower court, holding that Pickering had failed to establish any title.

We will now proceed to set out in substance, the opinion of the Supreme Court of the United States, when the case was last before it on writ of error. The opinion of the court delivered by Mr. Justice Brown (*Pickering* v. *Lomax*, 145 U. S., page 313):

"This case turns upon the question whether the act of Congress prohibiting Indian lands from being conveyed, except by permission of the President, is satisfied by his approval indorsed upon a deed thirteen years after its execution, and after the death of the grantee and the sale of the land by his administrator. (The court first goes on to dispose of the question of jurisdiction of the United States Supreme Court over the writ of error, which is not pertinent at bar, and then proceeds):

"So far as the main question is concerned, we know of no reason why the analogy of the law of principal and agent is not applicable here, viz.: That an act in excess of an agent's authority, when performed, becomes binding upon the principal, if subsequently ratified by him. The treaty does not provide how or when the permission of the President shall be obtained, and there is certainly

nothing which requires that it shall be given before the deed is delivered. *Doe* v. *Beardsley*, 2 McLean, 412. It is doubtless, as was said by the Supreme Court of Mississippi in *Harmon* v. *Partier*, 12 Sn. & Marsh, 425, 427, 'a condition precedent to a perfect title' in the grantee; but the neglect in this case to obtain the approval of the President for thirteen years only shows that for that length of time the title was imperfect, and that no action of ejectment would have lain until the condition was performed. Had the grantee, the day after the deed was delivered, sent it to Washington, and obtained the approval of the President, it would be sticking in the bark to say that the deed was not thereby validated. *A delay of thirteen years is immaterial, provided, of course, that no third parties have in the meantime legally acquired an interest in the lands.*

"*If, after executing this deed, Robinson had given another to another person, with the permission of the President, a wholly different question would have arisen. But, so far as Robinson and his grantees are concerned*, the approval of the President related back to the execution of the deed and validated it from that time. As was said by this court in *Cook* v. *Tullis*, 18 Wall. 332, 338: 'The ratification operates upon the act ratified precisely as though authority to do the act had been previously given, except where the rights of third parties have intervened between the act and the ratification. The retroactive efficacy of the ratification is subject to this qualification. *The intervening rights of third persons can not be defeated by the ratification.*' See also *Fleckner* v. *Bank of the United States*, 8 Wheat. 338, 363. In *Ashley* v. *Eberts*, 22 Indiana, 55, a

similar act of the president approving a deed was held to relate back and give it validity from the time of its execution, so as to protect the grantee against a claim by adverse possession which arose in the interim between its date and the confirmation. 'Otherwise,' said the court, 'a mere trespassser, by taking possession after a valid sale and before its consummation, would have power to defeat a *bona fide* purchaser.' This case was approved in *Steeple* v. *Downing*, 60 Indiana, 478, 497.

"In *Murray* v. *Wooden*, 17 Wend. 631, a conveyance of land by an Indian which, subsequent to its date, had been ratified by a certificate of approbation of the surveyor-general in the form prescribed by law, was held to be inoperative upon the ground that, previous to the granting of such certificate, the Indian had conveyed to a third person, and the deed to such person had been approved in the mode prescribed by law previous to the indorsement of the certificate of approbation of the deed first executed. This was a clear case of rights intervening between the execution of the first deed and its approval. In *Smith* v. *Stevens*, 10 Wall. 321, the right to convey the lands reserved for the benefit of the Indians was expressly vested in the Secretary of the Interior, upon the request of any one of the Indians named, and it was held that there being no ambiguity in the act which had provided the way in which the lands could be sold, by necessary implication it prohibited their being sold in any other way. 'The sale in question not only contravened the policy and spirit of the statute, but violated its positive provisions.' In that case there was no pretense that the requirements of the act had been fulfilled.

"Nor do we consider it material that the grantee had in the meantime died, since, if the ratification be retroactive, it is as if it were indorsed upon the deed when given, and inures to the benefit of the grantee of Horton, the original grantee—not as a new title acquired by a warrantor subsequent to his deed inures to the benefit of the grantee, but as a deed, imperfect when executed, may be made perfect as of the date when it was delivered. This was the ruling of the court in *Steeple* v. *Downing*, 60 Indiana, 478.

"The object of the proviso was not to prevent the alienation of lands *in toto*, but to protect the Indian against the improvident disposition of his property, and it will be presumed that the President, before affixing his approval, satisfied himself that no fraud or imposition had been practiced upon the Indian when the deed was originally obtained. Indeed, the record in this case shows that the President did not affix his approval until affidavits had been presented, showing that Pickering was the owner, and that the amount paid to Robinson was the full value of the land, and that the sale was an advantageous one to him.

"We are constrained to differ with the Supreme Court of Illinois in its view of the treaty, and *to hold that, so far as this question is concerned*, plaintiff's chain of title contained no defect."

It will be seen, from the opinion of the United States Supreme Court, that it only passed upon the question of law and the status of the case as *then* presented to it, and the then position of the case was that it had been submitted to the courts solely upon the case made out by the

plaintiff in ejectment, and that no evidence whatever had been offered in the court below as to the rights or title of the defendant, Lomax, because the lower court had held that Pickering having failed to make out his title it became unnecessary for Lomax to offer any evidence in defense.

Of course, if the case *now* made at bar, had been exactly similar to the case formerly presented, this court would feel itself bound by its former decision, and we therefore desire to point out the difference between the case now presented and as formerly presented so as to show that this court is in no way bound or controlled at bar by the decision formerly rendered by it.

In the first place, we now come within the very exceptions referred to by this court; and in fact the very words of its opinion, as now applicable at bar, would render the opinion now favorable to us at the present stage of the litigation. It will be observed all through that opinion that the court is very careful to predicate its decision solely upon the validity of the Horton deed as between the Indian and Horton and the government, and expressly excepts any case where the rights or title of third parties have intervened in the lands.

The court says (page 315): "*A delay of thirteen years in obtaining the approval of the President, is immaterial, provided, of course, that no third parties have in the meantime legally acquired an interest in the lands, if, after executing this deed, Robinson had given another to another person with the permission of the President, a wholly different question would have arisen.* * * * The ratification operates upon the act ratified precisely as though authority to do the

act had been previously given, except where the rights of the third parties have intervened between the act and the ratification. The retroactive efficacy of the ratification is subject to this qualification. The intervening rights of third persons can not be defeated by the ratification. * * * And in concluding its opinion the court says: 'We are constrained to differ with the Supreme Court of Illinois, *in its view of the treaty*, and to hold that, *so far as this question is concerned*, plaintiff's chain of title contained no defect.'"

In the case now made at bar, we submit that we have clearly established that Lomax and his grantors by purchase and deeds of conveyance had acquired intervening rights as third parties, and that therefore Pickering's chain of title was defective as against them, and came within the very exceptions referred to in the opinion, so that the opinion itself is not antagonistic to our rights now presented, but expressly favorable to them, and it must be constantly borne in mind that when that opinion was rendered, that none of the rights of Lomax nor of any third parties had been established, or were in evidence in the case.

Here at bar, we have established that at the time Lomax's grantors acquired title to the lands in question, there was absolutely nothing of record in the Cook county recorder's office to show that the original deed from the Indian, Robinson, to John F. Horton, had been approved by the President. It appears from the record (Transcript 28), that a copy of a deed from Joseph Robinson to John F. Horton, dated August 3, 1858 (page 30, Transcript), was submitted to the Department of the Interior, January

6, 1871, and submitted to the President on January 21, 1871, and approved by the President, January 21, 1871 (Transcript 31), and was recorded in Cook county, March 12, 1873.

The deed through which Lomax claims, namely, from Joseph Robinson and wife to Alexander McClure, was dated November 22, 1870 (Transcript 74), and was submitted to and approved by the President February 24, 1871 (Transcript 76), and recorded in the recorder's office of Cook county, March 11, 1871 (Transcript 84), and it will be seen that at the time McClure was negotiating for title, and at the date of his deed from Joseph Robinson, there was nothing upon the records of Cook county to apprise McClure that any previous deed given by Robinson to Horton had been approved by the President, and as a matter of fact no such approval had been given at that time. Horton, it appears, had waited over thirteen years to get the approval of the President, and after he had obtained it waited over two years longer to record it; whilst on the other hand McClure had obtained his deed and the Indian had himself obtained the President's approval upon it (Transcript 97), and McClure had finally recorded it, all within the space of three or four months, and there was surely nothing at that time to apprise McClure that any other deed to anybody else had been approved by the President; there was certainly nothing in the records of Cook county to show that the approval of the President had been obtained to any other deed, and there is no proof whatever that any deed from Robinson was then to be found on record in Washington in any department; surely, under such circumstances, McClure was a

third party with existing rights within the express meaning and limitations of the Federal court's opinion; and, of course, Lomax was a grantee under McClure's title and occupied the same position. We shall hereafter in this argument allude to the requirements of the recording acts of the State of Illinois in regard to the question of record title. It may be said, in passing, that this question of the requirements of the recording acts, either State or Federal, was not formerly before the courts in this case, because, of course, no intervening rights of third persons had been shown, so that the law relating thereto comes up also as a new question in the case at bar.

MEMORANDA OF DATES FOR CONVENIENT REFERENCE RELATING TO JOSEPH ROBINSON DEEDS.

In Pickering's Title.	In Lomax Title.
Joseph Robinson to John F. Horton. } Deed, Aug. 3d, 1858. Recorded July 16, 1861, in Cook county, Ill. (No approval of President.)	Joseph Robinson to Alexander W. McClure. } Deed, dated Nov. 22, 1870. Submitted to Interior Department Feb'y 21st, 1871. Submitted to and approved by President, Feb. 24th, 1871. Recorded March 11th, 1871, in the recorder's office of Cook county, Illinois. (Transcript 84.)
Joseph Robinson to John F. Horton. } Certified copy of above deed, certified to by Recorder August 1st, 1870. Recorded March 12th, 1873, in Cook county, Ill. This certified copy has annexed to it certain documents showing it was submitted to Department Interior Jan. 6th, 1871; submitted to President, Jan. 21st, 1871. Approved by President, Jan. 21st, 1871. No evidence of any recording in Washington till March 7, 1896. (Transcript 21.)	

Another new question which now comes up in the case, and which point has not heretofore been raised at the former hearings, is the want of validity of any title acquired by Pickering or his grantors under the partition proceedings in Cook county, and upon which necessarily his chain of title must rely. We take the position that no rights could be acquired by Pickering or his grantors, under any partition deeds or partition proceedings, unless the approval of the President had been obtained thereto, and there is no pretense in this case on the part of Pickering or his counsel that any such approval had or has at any time been obtained, and we shall make this part of our argument, and our exceptions were duly taken to this evidence. (Transcript, page 20, 21.)

So that to shortly sum up some of the differences now existing between this case, as formerly passed upon by the Federal court, and the case now presented, we have, amongst other things :

First: The evidence now offered by appellant Lomax at bar, which brings us within the exceptions and the law, as laid down by this court, in regard to the rights acquired by us as *third* parties.

Second: The construction of the Illinois recording act as applied to our rights.

Third: The validity of the partition proceedings, and the deeds thereunder.

Fourth: Absolute failure on the part of defendant in error to show any record title in Washington till within the last two years.

ASSIGNMENT OF ERRORS.

a In the Supreme Court of the United States.

JOHN A. LOMAX, Plaintiff in Error,
vs.
AQUILA H. PICKERING, Defendant in Error.
} Assignment of Errors.

And now comes John A. Lomax, the plaintiff in error, by John M. H. Burgett, his attorney, and assigns errors committed by the Supreme Court of the State of Illinois in this cause, and for cause of such errors shows:

1. That said Supreme Court of the State of Illinois erred in its construction of the treaty between the United States of America and the United Nations of Chippewa, Ottawa and Pottawatomie Indians of the waters of Illinois, Milwaukee and Manitouck rivers, made and concluded at Prairie du Chien on the 29th day of July, 1829.

2. That the Supreme Court of the State of Illinois erred in its construction of article four of said treaty.

3. That said court erred in holding against the validity of the provisions and restrictions contained in article four of said treaty as applied to the case made and title shown by the plaintiff in error.

4. That said court erred in holding that the defendant in error established such a title to the lands in question as enabled him to recover under the provisions and restrictions contained in said article four of said treaty as against the plaintiff in error upon the case made on the record at bar by the respective parties.

5. The said court erred in holding that the ap-

b proval of the President of the United States to the deed put in evidence by plaintiff in error from Joseph Robinson and wife to Alexander W. McClure was insufficient to give validity to said deed and confer title in the plaintiff in error as against the title of the defendant in error in evidence at bar.

6. The court erred in holding the partition proceedings and deeds in evidence in the chain of title produced by the defendant in error did not require evidence of the permission or approval of the President under the case presented at bar.

7. The court erred in holding that under the law the defendant in error established such a title or case as enabled him to recover against the plaintiff in error.

8. The court should have held that the defendant in error failed under the law to establish such a title as permitted a recovery against plaintiff in error upon the case presented at bar.

9. The court should have held that there was no legal evidence or notice at the time the deed from Robinson to McClure was approved by the President that the deed from Robinson to Horton had ever been approved or any permission given therefor by the President, and that therefore the defendant in error could not recover in the case at bar.

10. The court should have entered judgment for the plaintiff in error.

11. The court erred in entering judgment for the defendant in error.

12. The judgment and finding of the said court is against the evidence.

13. The judgment and finding of the said court is against the law.

14. The court erred in considering incompetent evidence on behalf of the defendant in error.

15. The court erred in refusing to consider competent evidence on the part of the plaintiff in error.

16. The court erred in considering evidence of the partition proceedings in the chain of title adduced by the defendant in error and in holding the same to be legal evidence in said chain of title as against the case made by plaintiff in error.

17. The court erred in entering judgment for the defendant in error, and for other and manifest errors appearing of record; wherefore plaintiff in error prays a reversal of the said judgment of the Supreme Court of the State of Illinois, with directions to the said court.

Argument of Law.

As we have heretofore seen, the result of the original litigation was, that the State Supreme Court held that the deed of Joseph Robinson to Horton was void, and passed no title, and that the subsequent permission of the President indorsed thereon did not make the deed valid. The Federal court held that the subsequent permission of the President related back, and did make the deed valid *simply* as *between the parties.*

When the case again came up before the Illinois Supreme Court it delivered an opinion which seems to have been predicated upon the mistaken assumption "that there was a record of the approval by the President in the

department at Washington." (See opinion, page 111, Transcript.)

In the first place, we need only to mention the axiomatic proposition of law, that the plaintiff in ejectment must recover on the strength of his own title, and not by the weakness of the defendant's title, and to the other well known proposition, that the burthen of proof in ejectment cases is upon the plaintiff to show that the defendant, as a subsequent purchaser, had notice of the plaintiff's rights.

We need not go into all the *minutiæ* of the various dates of instruments and dates of recording, because counsel for appellee will not contend that at the time the deed through which we claim was obtained, approved and filed for record, there was any deed from Robinson to Horton with the approval of the President upon or annexed to it, on file in the recorder's office of Cook county; there was nothing absolutely then and there on file, to show that any prior deed of the lands to any person had been approved by the President. And a person who waits over thirteen years before completing his title is certainly chargeable with *laches*. Our deed was the first deed filed for record with the approval of the President upon it. It is, of course, an elementary proposition, in all matters affecting the record title to lands, that the law of the *situs* prevails.

Though it was not necessary to record the patent from the United States, we claim it was essentially necessary to record any *deed* issued under that patent and that such recorded deed should show that it was in all respects a valid deed, as required by any condition or restrictions

in the patent; in other words, the record should have shown that everything had been complied with to make it a valid deed. And failing this, it could rightfully be treated by a subsequent purchaser as no deed; he was bound only by what appeared of record and not by anything which might have been done outside the record unless he had notice. Everybody knew, or was supposed to know, the laws of the country, and the existing restrictions upon conveyances by Indians, and these restrictions were clearly set out in our original patent, which we produced at the trial (Transcript, page 13), and any deed appearing of record, unsanctioned by the President, amounted to no more than if the Indian had conveyed the whole of the United States.

We claim that the provisions of the Illinois recording acts are mandatory upon the appellee; that after the patent had once issued from the United States, anything thereafter relating to the title, would be subject to the directions of the State law, and its provisions with regard to the recording of instruments; and the United States Supreme Court emphatically holds this to be the law in the case of

Wilcox v. *Jackson*, 13 Peters, U. S. 498,

(which is a case affecting the Fort Dearborn lands in Cook county). The court says, on page 517: "We hold the true principle to be this, that whenever the question in any court, State or Federal, is whether a title to land, which had once been the property of the United States, has passed, that question must be resolved by the laws of the United States; but that whenever, according to those laws, the title shall have passed, *then that property, like all*

other property in the State, is subject to State legislation, so far as that legislation is consistent with the admission that the title passed and vested according to the laws of the United States." Or as Mr. Washburne, in treating upon the subject of title by grant, puts it (3d Washburne on Real Property, 3d Edition, page 169):

"But as soon as the title shall have passed from the United States, it takes the character of other property within the State and is subject to State legislation."

The Illinois recording act provides, Sec. 28, Par. 29, title, Conveyances, page 590, 1 Starr & Curtis.

"Deeds, mortgages, powers of attorney, *and other instruments*, relating to or affecting the title to real estate in this State, shall be recorded in the county in which such real estate is situated."

By Sec. 30, Par. 31, of the same act, it is provided that "All deeds, mortgages and *other instruments in writing*, which are authorized to be recorded, shall take effect and be in force from and after the time of filing the same for record, and *not before*, as to all creditors and subsequent purchasers without notice; and all such deeds and *title papers* shall be adjudged void as to all such creditors and subsequent purchasers without notice until the same shall be filed for record."

Our Illinois Supreme Court has held that the records of the county commissioners' court showing sales of land, are not notice, either actual or constructive, to subsequent purchasers, that the title should be recorded in the proper recorder's office, and that that is the only place one is required to look.

Bourland v. *County of Peoria*, 16 Ill. 538.

It is also held that the entry of lands sold by the United States upon the land book in the county clerk's office of the county where the lands are situated, affords no constructive notice of the facts appearing therefrom to subsequent purchasers.

Betser v. *Rankin*, 77 Ill. 289.

And these cases have been approved by the Federal courts.

Lewis v. *Barnhardt*, 43 Fed. Rep. 854.

Our Illinois Supreme Court also holds that "a subsequent purchaser has a right to presume, in the absence of any other information, that whatever title the prior purchaser has, is on record, as the law requires it to be, and that he has no title if the record shows none."

St. John v. *Conger*, 40 Ill. 535.

The Appellate Court of Illinois in an opinion by Mr. Justice Bailey, holds that "The record of a deed or mortgage is constructive notice to subsequent *bona fide* purchasers or incumbrancers of only what appears on the face of the instrument as recorded. The rule that what is sufficient to put a purchaser upon inquiry is notice of whatever the inquiry would have disclosed, has no application. That rule applies to actual, not constructive notice."

Buttenhouser v. *Bullock*, 11 Illinois Appellate, 665.

A void instrument puts no one upon inquiry as to anything not contained therein.

Bullock v. *Buttenhouser*, 103 Ill. 28.

Now at the time our deed of Robinson to McClure was

given, which was on the 22d of November, 1870, it is clear that at that time, as a matter of fact, the President had never approved the deed from Robinson to Horton; for that approval was not obtained until the 21st of January, 1871, some two months later. It is true it was approved by the President about a month before ours was, but such approval was not recorded until about two years after our deed was filed for record with the President's approval upon it. We say that we had no means of ascertaining what might have been done privately by the President in Washington, but were required to look only to the archives of Cook county and see if anything had been done; and in the absence of any information upon the subject, we had a right to presume that nothing had been done, as the deed then on record discloses no Presidential approval.

And there is no reason why we should be held to have any constructive notice; and even as to the doctrine of constructive notice, both the Illinois court and this court have followed the doctrine laid down by Vice Chancellor Wigram and Lord St. Leonards; and say in the case of

Grundies v. *Reed*, 107 Ill. 312,

"When mere want of caution as distinguished from fraudulent and willful blindness, is all that can be imputed to a purchaser, then the purchaser will, in equity, be considered, as in fact he is, a *bona fide* purchaser without notice." This is clearly Sir Edward Sugden's opinion, and with that sanction, I have no hesitation in saying it is mine also. Or as said by Lord Chancellor Cranworth, "the question upon constructive notice is not whether the purchaser had the means of obtaining, and

might, by prudent caution, have obtained the knowledge in question, but whether the not obtaining it was an act of culpable negligence."

The United States Supreme Court also quotes the same language and asserts it to be undoubted law.

Wilson v. *Wall*, 6 Wall. U. S. 91.

We fail to see upon such a state of facts as developed by this record with regard to the question of recording and the rights of subsequent purchasers, how Pickering can be said to have legally established his title as against us. Certain it is that the approval of the President to the deed could be manifested in no other way than in writing, and was in fact, manifested in writing immediately it was obtained; hence, we say within the meaning of the recording laws, it was "an instrument in writing affecting the title of real estate," and a title paper clearly within the express provisions, meaning and intent of the Illinois recording act.

The United States Circuit Court of Kansas expressly holds that "The recording of a conveyance made by an Indian of a tract of land (which had been allotted to him in severalty) before he had a right to convey the same *is no notice to subsequent grantees of the land of the former grantee's rights.*"

Briggs v. *Sample*, 43 Federal Reporter 102.

BESIDES, THERE IS ABSOLUTELY NOTHING IN THE CASE ESTABLISHED BY DEFENDANT IN ERROR, OR ANYWHERE IN THE RECORD TO SHOW WHEN OR AT WHAT TIME THIS CERTIFIED COPY OF HIS DEED FROM ROBINSON TO HORTON, WITH THE APPROVAL OF THE PRESIDENT UPON IT, WAS RECORDED

IN WASHINGTON. THERE IS NO EVIDENCE AT ALL WHEN THIS CERTIFIED COPY OF DEED, RELIED UPON BY HIM, WAS RECORDED IN WASHINGTON. AT THE TIME WE OBTAINED THE PRESIDENT'S APPROVAL UPON OUR DEED, THERE IS NOTHING WHATEVER IN THIS RECORD TO SHOW THAT WE COULD HAVE DISCOVERED ANYTHING WHATEVER OF RECORD IN WASHINGTON AS TO ANY OTHER DEEDS AND PRESIDENTIAL APPROVEMENTS TO ANY OTHER PERSON WHOMSOEVER.

And yet the Supreme Court of Illinois say, that if we only looked at the records in Washington, we could have found out.

The only proof that defendant in error attempted to offer of any such record, appears (on pages 21 and 22 of Transcript), where he offers a certificate of D. M. Browning, commissioner of Indian affairs, dated at Washington, March 7, 1896 (only two years ago), certifying the paper attached is a true copy of the certified copy of the original deed from Robinson to Horton, as the same appears of record in the Department of the Interior, but there is nothing to show *the date of its record.*

The most that can be said from this certificate, or from any other proof adduced, is that on the 7th of March (1896), such an instrument was *then* appearing of record at Washington.

Whether or not such an instrument appeared of record in Washington before that time, as a matter of fact does not appear anywhere upon the record at bar, and from all the record at bar shows, certain it is that there was no record notice in Washington which could disclose to the President himself, or to the grantors of Lomax, when

the approval of the President to their deed was obtained, that any instrument relied upon by defendant in error was then and there recorded at all.

It must be remembered that our deed (Robinson to McClure) was approved by the President February 24, 1871, and from defendant in error's own standpoint it was necessary for him to show at least that before that time, the Washington records disclosed a prior deed or an approved deed from Robinson to Horton, and of that there is positive failure of any proof.

In plain English, and divested of all technicalities and specific dates, defendant in error contends that if we had only looked in Washington we could have found out something which his own evidence fails to show we could have found out; and we know of no rule of law in regard to record title, or anything else, which makes it incumbent upon us to ascertain the existence of something which a plaintiff in ejectment has absolutely failed to prove to be in existence.

An admitted and necessary link in the plaintiff's chain of title, and necessary for him from his own standpoint to furnish, was a prior record title in Washington, and from his own record he has absolutely failed to furnish any proof of such title.

We desire to point out, in concluding this branch of the subject, that of course no presumption can be indulged in that this instrument was recorded the same day it was submitted to the President, because in the first place presumptions of record title can not be indulged in, and if they could, it plainly appears, from appellee's own case, that there were quite long delays in

Washington in getting instruments from one department to another; for instance, there was a delay of over two weeks in getting this very deed out of the Interior Department to the President, for it was submitted to the Department of the Interior January 6, 1871, and not submitted to the President until January 21st, and if any presumptions were indulged in, it is likely it took much longer time before it got back again and was finally recorded; and as our deed was submitted to the President in one month thereafter, the question of the date of appellee's record would be a very important factor if the Washington record controlled; but of course this court is not going to indulge in any presumptions, in any event. It is quite evident that President Grant himself could find no record of any previous deed or approval or he would certainly not have approved two separate deeds of the same lands to different people; this of itself affords a fair presumption that no prior deed was on record in Washington, but in any event there is no proof whatever by defendant in error of any such record.

Cooley, in his work on Constitutional Limitations, third edition, page 378, says: "Conceding that an invalid deed may be made good as *between the parties*, yet, while it remains invalid and the grantor still retains the legal title to the lands, and a third person is purchaser and received a conveyance, with no notice of any fact which should preclude his acquiring an equitable as well as a legal title thereby, it would not be in the power of the legislature to so confirm the original deed as to divest him of the title he has acquired. The position of the case is altogether changed by this purchase. The legal

title is no longer separated from the equities, but in the hands of the second purchaser is united with the equity as strong as it exists in favor of him who purchased first; and under such circumstances even the courts of equity must recognize the right of the second purchaser as best, and as entitled to the usual protection which the law accords to vested interests," etc.

The Supreme Court of the United States has itself unqualifiedly approved the decisions of the Supreme Court of the State of Illinois, with regard to the enforcement of the strict requirements of the recording laws of the State of Illinois, and held that unless every essential requirement of those recording laws with regard to record title is complied with, a subsequent purchaser can not be held to have constructive notice of anything that does not appear on the face of the record itself.

Lewis v. *Bernhart*, 145 U. S. pp. 56-75, etc.

Or as laid down by the Illinois court, in refuting an argument similar to one made by appellee at bar: "This proposition in effect is that if a person has got a deed of a tract of land having no recorded title, he must, nevertheless, be supposed to have had some title, and subsequent purchasers must take notice of whatever title he had. Much as registry laws have been frittered away by the doctrine of putting parties upon inquiry, we do not think any court has ever gone to the extent of adopting this rule. It would substantially defeat the object of registry laws. Their object is to provide a public record which shall furnish to all persons interested authentic information as to the title to real estate, and enable them to act on the information thus acquired. This rule would require a

person purchasing from one who has the title on record, to take subject to the unrecorded deeds of persons claiming under a chain of title having no connection of record with the true source of title. If such purchaser is to be held to notice of such chain of title at all, he has the right to presume in the absence of any other information *that whatever title the persons claiming under such chain have, is on record as the law requires it to be, and that they have no title if the record shows none.*

St. John v. *Conger*, 40th Ill. pp. 535, 537.

Or as again said by that court, "to take the case out of the registry acts so as to defeat the title of a subsequent purchaser, who first places his deed upon record, on the ground that he had actual notice of a prior unrecorded deed of the same premises, the proof of such notice should be clear and positive so as to leave no reasonable doubt that the taking of the second conveyance was under the circumstances an act of bad faith toward the first purchaser."

Rogers v. *Wiley*, 14th Ill. p. 66.
Robertson v. *Wheeler*, 162 Ill. 566.

Or as said by that court, "the words subsequent (purchasers), as used in the recording act, must have reference to the recording, and not to the date of the instrument, and such indeed is, its literal and grammatical construction. As between the grantor and grantee the transaction is complete upon the execution and delivery of the deed; but as between the grantee and third persons without notice that purchase may be said not to be complete till the title paper is left for record.

Doyle v. *Teas*, 4th Scammon, p. 253.

Or, as said by the United States Supreme Court: "The general rule is where several parties set up conflicting claims to property with which a special tribunal may deal, as between one party and the government, regardless of the rights of others, the latter may come in to the ordinary courts of justice and litigate the conflicting claims, and the State courts have jurisdiction to inquire into them."

Garland v. *Wynn*, 20th Howard, U. S. p. 8.

The Supreme Court of the United States in passing upon the validity and requirements of the Illinois State laws relating to the transfer of lands within that State, notwithstanding the inquiry as to the title may be in a United States Court, holds the law to be that the laws of the State of Illinois in which the land is situated control exclusively its descent, alienation and *transfer*, and the effect and construction of instruments intended to convey it, and the laws there and then in existence when a contract in regard to real estate is made, enter into and become a part of such contract, and after quoting and reviewing numerous Illinois and other decisions say (page 636) we will close the citations by using the language which had the unanimous consent of the court. In the recent case of *Magoon* v. *Scales*, 9th Wallace, 23: "*It is a principle too firmly established to admit of dispute at this day that to the law of the State in which the land is situated, must we look for rules which govern its descent, alienation and transfer and for the effect and construction of conveyances.*"

Brine v. *Insurance Co.*, 96 U. S., pages 627–635, 636.

The learned author, Mr. Wharton, in his treatise on Conflict of Laws, says, *that the law of situs must always prevail in the recording of titles to real estate; otherwise a person would have to search the records of every State, and then he could not guard against other incumbrances which might have been made whilst he was on his travels,* and then concludes: "The only relief is the adoption of the *lex rei sitæ*. By "this is prescribed a field of exploration which is easily "defined and as easily examined. No incumbrances "exist on the land that the law of its situation does not "indicate. A purchaser knows what is the law as to such "incumbrances, and knows where they are to be found "He knows that, subject to this law, he can obtain a per-"fect title which the law will defend to the end."

Wharton on Conflict of Laws, 2d edition, Sec. 284 (*h*).

And to the same effect see Story on Conflict of Laws, 8th edition, Sec. 424, 428.

The United States Courts fully adopt this rule.

U. S. v. *Crosby*, 7 Cranch 115.
Clark v. *Graham*, 6 Wheaton, 577.
Kerr v. *Moon*, 9 Wheaton, 565.

And even in a case where land was devised to the United States Government, they hold the law of the State *situs* prevailed and prevented the land from passing.

U. S. v. *Fox*, 94 U. S. 315.

Under the requirements of the Illinois recording laws as construed, both by the United States Supreme Court, and by the Illinois court, and under all the authorities we fail to see how defendant in error made out any case,

even assuming that there had been any record notice in Washington.

II.

We also claim that no legal title could be acquired by the defendant in error which came through the proceedings in partition in the courts of Cook county, and the deeds made thereunder.

The provisions of the patent issued under the Indian treaty were " but never to be leased or conveyed by *him, them, his or their heirs* to any person whatsoever without the permission of the President." (Transcript 15.)

We think it self-evident that under this provision *no* conveyance could be made to any person, or by one Indian to another Indian, any more than from an Indian to a white man.

It is self-evident by the partition deeds that some of the Robinson Indians did convey, each to the other, the lands in controversy, without any pretense of having, at any stage in these proceedings, obtained the approval of the President, and that the lands in controversy were set off to Joseph Robinson thereunder. The object of the treaty and patent provision was to protect the Indian against himself and the machinations of any person whatever, whether he were a white man or a red man. We claim, in short, that defendant in error failed to establish his chain of title, because he could derive no title through any partition deeds which were never approved or sanctioned by the President; and the fact that the County Court made a decree in partition, can in no way give validity to those deeds which we say required the approval of the President just the same as any other deed.

III.

Of course we are not called upon to absolutely establish in every minute detail the validity of our title in defending an action of ejectment, the burden is upon appellee to establish a title superior to ours. The undisputed fact remains, that we fairly bought this land from the Indian, Robinson, and paid him a fair compensation for it, and that he came to us to sell us the land, telling us that he had not previously been paid for it by anybody else, and that any deed that he had made had been done without the approval of the President, and when our deed was approved by the President it was mailed back from Washington to Robinson himself and he brought it and delivered it to us. (Transcript 96 and 97.)

To succeed in ejectment, plaintiff is of course bound to show in himself a fee simple title at law as distinguished from any equitable title.

Esker v. *Heffernan*, 159th Ill., page 38–41.

Perhaps this argument may be best concluded in the terse and forcible language of the Illinois court in a case decided by it, as very applicable to the facts at bar. In the case of *Kennedy* v. *Northrup*, 15 Ill., page 148–157, this court says: "By the fault of some one the land has been twice sold, from which some one must suffer; and is it not right, is it not in harmony with every principle of law, that he who is in fault in not notifying the world by recording his deed, shall suffer the loss which has resulted from such negligence."

Under the present status of this case, where the rights of plaintiff in error, as a third party, are now so plainly

apparent, it seems to us that the subsequent ratification of the President, can not relate back and give validity to a void conveyance, as this court has so expressly held in the case of

Smith v. *Stevens*, 10 Wallace, 321.

Leaving this case, as we now leave it, with full confidence in the decision of this honorable court, we have only to say in conclusion, that whatever the United States Supreme Court may have *heretofore* said upon any branch of this case, has now absolutely nothing whatever to do with the question of our rights, as third parties generally, or of the validity of the partition proceedings, or of the requirements of the recording acts; because, when the case was formerly before the Federal Court, *there was then no question of intervening rights of third parties or record notice to subsequent purchasers before it, either of record notice in Washington, or record notice in Illinois.* But we now come by the case at bar, and show ourselves to be *bona fide* subsequent purchasers for valuable consideration, without legal notice, actual or constructive, of record title anywhere; and so coming, now confidently assert upon this record, this court can do no other than reverse the erroneous judgment of the Illinois court with proper directions to it.

And we respectfully submit that such judgment must and necessarily will be, so reversed.

JOHN M. H. BURGETT,
Attorney for Plaintiff in Error.

JAMES MAHER,
A. W. BROWNE,
Of Counsel.